United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed October 2, 2001

No. 00-5070

Augustine David Henderson,
Appellant

v.

Roger A. Kennedy, et al.,
Appellees

Consolidated with
No. 00-5071

On Appellants' Petition for Rehearing

Before: Henderson, Randolph, and Garland, Circuit Judges.

Opinion for the Court filed by Circuit Judge Randolph.

Randolph, Circuit Judge: The petition for rehearing directs us to amendments of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. s 2000bb et seq., enacted a year ago, but not mentioned by either side when the case was last

before us. The petition argues that the amendments render erroneous our decision sustaining, as against a claim under RFRA, the National Park Service's regulation prohibiting the sale of t-shirts on the National Mall.

RFRA had defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. s 2000bb-2(4) (1999). The Religious Land Use and Institutionalized Persons Act (RLUIPA), Pub. L. No. 106-274, ss 7-8, 114 Stat. 803, 806 (2000), altered the definition to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. s 2000cc-5(7)(A), incorporated by 42 U.S.C. s 2000bb-2(4).

The amendments remove the doubt expressed in our opinion, see Henderson v. Kennedy, 253 F.3d 12, 16 (D.C. Cir. 2001), that the portion of RFRA remaining after City of Boerne v. Flores, 521 U.S. 507 (1997)--the portion, that is, applicable to the federal government (and not enacted pursuant to s 5 of the Fourteenth Amendment)--survived the Supreme Court's decision striking down the statute as applied to the States.

The amendments did not alter RFRA's basic prohibition that the "[g]overnment shall not substantially burden a person's exercise of religion." 42 U.S.C. s 2000bb-1(a). See also Henderson, 253 F.3d at 15; Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001); Murphy v. Zoning Comm'n of the Town of New Milford, 148 F. Supp. 2d 173, 188 (D. Conn. 2001). Our opinion assumed that plaintiffs Henderson and Phillips wanted to sell t-shirts on the Mall because of their religious beliefs. Our focus was on whether the Park Service regulation imposed a "substantial burden" on their exercise of religion. See Henderson, 253 F.3d at 16-17. In reaching our judgment we examined the importance of selling t-shirts on the Mall to the plaintiffs. Our conclusion was this: "Because the Park Service's ban on sales on the Mall is at most a restriction on one of a multitude of means [by which petitioners may engage in their vocation to spread the gospel], it is not a substantial burden on their vocation. Plaintiffs can still

distribute t-shirts for free on the Mall, or sell them on streets surrounding the Mall." Id. at 17. That conclusion is unaffected by the amendments of RFRA. Although the amendments extended the protections of RFRA to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief," 42 U.S.C. s 2000cc-5(7)(A), incorporated by 42 U.S.C. s 2000bb-2(4), the amendments did not alter the propriety of inquiring into the importance of a religious practice when assessing whether a substantial burden exists. The petition for rehearing is therefore denied.

So ordered.